IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.314 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B. ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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BABUBHAI MERUBHAI ANTROLIYA – Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MS BANNA S DUTTA for Appellant.
MR ND GOHIL, APP for Respondent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 07/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 (“the Code” for short) is directed against judgment dated January 11, 2002

rendered by the learned Sessions Judge, Junagadh, in Sessions Case No.56 of 2000 by which the appellant is convicted under Section 20(B) as well as Section 29 of the Narcotic Drugs & Psychotropic Substances, Act, 1985 ("the Act" for short), and sentenced to suffer R.I. for ten years and fine of Rs.1 Lakh, in default S.I. for one year. It may be mentioned that there is nothing like Section 20(B) of the Act and, therefore, conviction of the appellant shall have to be regarded as recorded under Section 20(b)(ii)(B) of the Act as amended by Act No.9 of 2001.

2. The facts emerging from the record of the case are as under:

In or about January 2000, Mr.R.N.Dayatar was discharging duties as Police Sub Inspector of Shil Police Station. On January 22, 2000, he received an information at 8.30 A.M. that in field known as "Pakharidhar" situated in *sim* of Village Fulrama, the appellant had cultivated cannabis plants of genus *ganja* and after reaping the same, was about to dispose of the same. On receipt of the information, Mr. Dayatar reduced the same into writing by making entry in Station Diary maintained

at Shil Police Station. He forwarded a report to his immediate official superior, i.e. Mr.P.C.Baranda, who was then Sub Divisional Police Officer, Mangrol, through Police Constable Mahavirsinh Abhesinh Chudasma. On receipt of the report, Mr.Baranda, in the company of Police Constable Mahavirsinh Abhesinh and Head Constable Bhikhubhai Jivabhai proceeded towards Shil Police Station. Mr.Dayatar instructed Police Constable Mahavirsinh Abhesinh to requisition services of panch-witnesses as well as photographer. Accordingly, Police Constable Mahavirsinh Abhesinh secured services of two persons, i.e. (1) Danabhai Nathubhai Rabari as well as (2) Ramdebhai Ramabhai Bharda, and Bhupatbhai Masribhai Vaja, who was photographer. As the persons summoned through Police Constable Mahavirsinh Abhesinh had shown willingness to act as panch-witnesses, the information received by Mr.Dayatar was conveyed to them. The first part of panchnama was drawn at Shil Police Station. Thereafter, the Police Officials with panch-witnesses and photographer went in two vehicles to Fulrama Village. On way, a Videographer from Village Bantwa was also summoned. Before leaving Shil Police Station, Mr.Dayatar had collected cord, packneedle, official seal, etc., which normally would be needed at the time of search and

seizure of offending article. The vehicles were parked near Khodiyar Mandir and thereafter, the members of the raiding party went to the field of the appellant on foot. On reaching the field, it was noticed that the plants of genus *ganja,* which were cultivated, were reaped and heaps of the same were made. The person, who was present in the field, made an attempt to flee on seeing the police personnel, but was apprehended. On interrogation, he disclosed his name to be Babubhai Merubhai Antroliya (the appellant) of Village Fulrama. The appellant was conveyed the information received by PSI Mr.Dayatar and was told that it was necessary to search the field. Before effecting the search, it was offered to the appellant that the field could be searched in presence of a magistrate or a gazetted officer if so desired by him. However, the appellant expressed his willingness that the field be searched by Mr.Dayatar as Sub Divisional Police Officer, Mr.Baranda, was also present. The search of the field resulted into find of different heaps of cannabis plants. The plants were *prima facie* ascertained to be of genus *ganja* on smelling. It was necessary to weigh the substance found from the field possessed by the appellant. Therefore, Police Constable Mahavirsinh Abhesinh was asked to bring a person to weigh

the offending substance. Accordingly, Police Constable Mahavirsinh Abhesinh summoned Babubhai Devabhai Bhuva, who is doing business in Village Bhathrot, to weigh the substance found. Mr.Babubhai Bhuva weighed the substance, namely, 1123 small and big heaps of cannabis plants of genus *ganjas.* The weight of the same was found to be 18 Kilograms And 350 Grams. The whole procedure of find of cannabis plant, seizure, sealing, etc. was videographed. The quantity of cannabis plant was placed in jute bag, which was properly packed and sealed. The appellant was called upon to produce any pass or permit authorizing him to cultivate cannabis plant for medical or scientific purpose. No licence, permit or authorisation could be produced by the appellant. As the appellant was found to have committed offence punishable under the Act, the appellant was arrested. Second part of the panchnama was drawn at the field itself. Mr.R.N.Dayatar, PSI of Shil Police Station, brought the appellant to Shil Police Station. He handed over his complaint to Police Head Constable Husainkhan Ibrahimkhan for registration of the offence. The Police Head Constable accordingly registered the offences and handed over the complaint of Mr.Dayatar to Mr.Dayatar himself for further investigation. Mr.Dayatar made a report to SDPO, Mangrol, and CPI,

Mangrol, about the raid carried out at the field of the appellant as well as find of cannabis plants from the field of the appellant and his arrest under the Act. PSI Mr.Dayatar handed over *muddamal* for safe custody to Crime Writer Head Mr.Sevadas Premdas of Shil Police Station to be forwarded to Forensic Science Laboratory (F.S.L.) for analysis. The sealed *muddamal* was kept in *muddamal-room* maintained at the Police Station itself. January 23, 2000 was Holiday being Sunday. Therefore, on January 24, 2000, Crime Writer Head Mr.Sevadas sent *muddamal* to F.S.L. for analysis through Police Constable Dalpatbhai Devjibhai. Police Constable Dalpatbhai Devjibhai delivered *muddamal* to F.S.L. for analysis. The report of analysis indicated that morphological and microscopical examinations were carried out of the material, which was kept in jute bag and all 1123 plants were identified as *ganja* plants (cannabis plants) along with leaves, stem, root, female flowering tops seeds and fruits as defined in the Act. PSI Mr.Dayatar also recorded statements of those persons, who were found to be conversant with the facts of the case. On completion of the investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate First Class, Mangrol, for commission of offences punishable under

Section 20(B) and Section 29 of the Act. As the offences punishable under the Act are exclusively triable by a Judge of Special Court, the case was committed to the Court of learned Special Judge, Junagadh, for trial where it was numbered as Sessions Case No.56 of 2000.

3. The learned Sessions Judge, Junagadh, framed necessary charge against the appellant at Exh.1. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Danabhai Nathubhai as P.W.-1 at Exh.12; (2) Ramdebhai Ramabhai as P.W.-2 at Exh.15; (3) Merubhai Devabhai as P.W.-3 at Exh.16; (4) Police Constable Mahavirsinh Abhesinh Chudasma as P.W.-4 at Exh.19; (5) Jivrajbhai Bavabhai Patel as P.W.-5 at Exh.20; (6) Babubhai Devabhai as P.W.-6 at Exh.21; (7) Bhupatbhai Mashri Vaja as P.W.-7 at Exh.23; (8) Lalit Rijumal Chandvani as P.W.-8 at Exh.52; (9) Divisional Police Officer Mr.P.C.Baranda as P.W.-9 at Exh.54; (10) Sevadas Premdas as P.W-10 at Exh.56; (11) Dalpatbhai Devjibhai as P.W.-11 at Exh.57; (12) Husainkhan Ibrahimkhan as P.W.-12 at Exh.61; (13) Ramanlal Nathabhai Dayatar as P.W.-13 at Exh.69; and, (14) Bhashkerrav Lakduji Vagh as P.W.-14 at Exh.84, to prove its case

against the appellant. The prosecution has also produced documentary evidence such as panchnama indicating search of field of the appellant and find of 1123 cannabis plants as well as seizure of the same at Exh.13; Village Form No.8A indicating that the appellant was in possession of the field in question at Exh.17; Form No.7/12 indicating that the appellant was in possession of the field in question at Exh.18; certificate issued by witness Babubhai for weighing the substance found from the field of the appellant at Exh.22; fourteen negatives of the photographs at Exhs.24 to 37; fourteen original photographs at Exhs.38 to 51; video-cassette at Exh.53; report under Section 42(2) of the Act forwarded by Mr.R.N.Dayatar to Mr.Baranda, who was his immediate official superior at Exh.55; intimation by PSO of Shil Police Station to PSI Shil Police Station mentioning that the offences punishable under Section 20(B) and Section 29 of the Act were registered and that the same should be investigated by him at Exh.62; necessary Wireless Message Form showing that cannabis plants, which were 1123 in number and weighing 18 Kgs. and 350 Gms., were seized from the field which was in possession of the appellant at Exh.63; necessary entries from Station Diary showing that the information received by Mr.Dayatar was

reduced into writing at Exhs.65 and 66; the complaint lodged by PSI Mr.Dayatar at Exh.67; report submitted to the learned Magistrate as required under Section 157 of the Code at Exh.68; necessary entry from the Register wherein Secret information were being noted at Exh.71; entry indicating that offending substance found was placed in sealed jute bag at Exh.72; grounds of arrest communicated to the appellant at Exh.74; intimation to Ms.Maniben that her husband was arrested for commission of offences punishable under the Act at Exh.75; receipt indicating that *muddamal* was received by the F.S.L. for analysis at Exh.77; report of the analysis at Exh.78; writing mentioning that the provisions of Section 50 of the Act were complied with at Exh.79; seizure report at Exh.80, etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge of the trial Court explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code. In his further statement, the appellant claimed that a false case was filed against him, but he

was innocent. However, he did not adduce any defence evidence at all.

5. On appreciation of evidence led by the prosecution, the learned Judge of the trial Court held that it was satisfactorily proved by the prosecution that on January 22, 2000, 1123 *ganja* plants weighing about 18 Kilograms & 350 Grams were seized from the field situated in *sim* of Village Fulrama, which was in possession of the appellant. The learned Judge noticed that the provisions of Sections 42 and 50 of the Act were complied with by PSI Mr.Dayatar before search of the field of the appellant was effected. The learned Judge noticed that nothing was produced by the appellant to probabilise his defence that he was implicated falsely in the case. In view of abovereferredto conclusions, the learned Judge of the trial Court convicted the appellant under Sections 20(B) and 29 of the Act. Thereafter, the learned Judge heard the learned counsel of the appellant and the appellant himself as well as the learned Additional Public Prosecutor on the question of sentence to be imposed on the appellant. The learned Judge noticed that the provisions of the Act of 1985, as amended by Act No.9 of 2001, were applicable to the facts of the case.

However, without assigning any reason, the learned Judge, after hearing the learned counsels of the parties, has sentenced the appellant to R.I. for ten years and fine of Rs.1 Lakh, in default S.I. for one year, for commission of offences punishable under Sections 20(B) and 29 of the Act vide judgment dated January 11, 2002, giving rise to instant appeal.

6. This Court has heard Ms.Banna Dutta, learned counsel of the appellant, and Mr.N.D.Gohil, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. The plea that the appellant was neither in possession of the field in which the cannabis plant was cultivated nor evidence is adduced to show that he had, in fact, cultivated cannabis plant in the said field and, therefore, the conviction of the appellant should be set aside, is devoid of merits. The testimony of witness Merubhai Devabhai recorded at Exh.16 shows that he was discharging duties as Talati-cum-Mantri of Fulrama Gram

Panchayat from year 1994. The witness has produced Village Form No.8A at Exh.17 which indicates that Survey No.22/3 P/3 of Village Fulrama was owned by Koli Babu Meru, i.e. the appellant. This witness has further produced Village Form No.7/12 relating to Survey No.22/3 P/3 of Village Fulrama, which is known as “Pakharidhar”. It indicates that the appellant was in possession of said Survey Number. Further, Village Form No.12 is also produced, which indicates that the name of the appellant is shown as cultivator of the land. Thus, there is no manner of doubt that the appellant was in possession of the filed in question, which was raided by PSI Mr.Dayatar in the company of Sub Divisional Police Officer Mr.Baranda and others. The testimony of Police Officials examined in the case read with that of photographer, Bhupatbhai Masri Vaja recorded at Exh.23, and videographer, Lalitbhai Rijumal Chandvani recorded at Exh.52, shows that not only the appellant had cultivated the cannabis plants but after reaping the same, had prepared bundles thereof. The record further shows that on seeing the Police Officials, the appellant had made an attempt to abscond from his field, but that attempt was foiled by the Police Officials. Therefore, it is not correct to say that the appellant was not in possession of the filed in question nor had cultivated the cannabis

plants and, therefore, should be acquitted.

8. The plea that mandatory provisions of Section 42 of the Act are not complied with and, therefore, the appellant should be acquitted is merely stated to be rejected. Admittedly, the field raided is neither a building nor a conveyance nor an enclosed place and, therefore, provisions of Section 42 of the Act would not be applicable to the facts of the case. This is so in view of the decisions of the Supreme Court in (1) **Rajendra & Another vs. State of M.P., (2004) 1 SCC 432;** (2) **Krishna Kanwar vs. State of Rajsthan, (2004) 2 SCC 608;** and (3) **State of Hariyana vs. Jarnail Singh, (2004) 5 SCC 188.** Even otherwise, the evidence on record clinchingly establishes that the provisions of Section 42 of the Act were scrupulously followed by PSI Mr.Dayatar, who had received the secret information. Mr.Dayatar in his substantive evidence before the Court has asserted that on receipt of the information, he had reduced the same into writing and made necessary entry in the Station Diary maintained at Shil Police Station. To support his assertion, he has produced copy of entry at Exh.65. Thus, the evidence on record establishes beyond pale of doubt that the information received by Mr.Dayatar was reduced into writing. The record further shows that necessary

report was forwarded by PSI Mr.Dayatar to his immediate official superior, i.e. Sub Divisional Police Officer Mr.Baranda through Police Constable Mr.Mahavirsinh, which is quite evident from the testimony of Police Constable Mahavirsinh Chudasma recorded at Exh.19 and the testimony of Mr.Baranda recorded at Exh.54. Police Constable Mahavirsinh Chudasma in his testimony before the Court has stated that on January 22, 2000, he was handed over a sealed cover by PSI Mr.Dayatar to be delivered to SDPO Mr.Baranda. Mr.Baranda has stated in his testimony that he had received the report made by PSI Mr.Dayatar, which was sent through Police Constable Mahavirsinh. The report made by PSI Mr.Dayatar to SDPO Mr.Baranda is produced by the prosecution at Exh.70. Thus, there is no manner of doubt that the report contemplated by Section 42(2) of the Act was forwarded by PSI Mr.Dayatar to his immediate official superior and it is not correct to contend that the mandatory provisions of Section 42(2) of the Act were committed breach of by Mr.Dayatar.

9. The plea that the provisions of Section 50 of the Act were not complied with and, therefore, the impugned judgment should be reversed, is also merely stated to be rejected. What was searched was the field,

which was in possession of the appellant, wherein the appellant had cultivated the cannabis plants. The record does not indicate that the person of the appellant was searched. Therefore, the provisions of Section 50 of the Act would not apply to the facts of the case in view of decision of the Supreme Court in **State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350.** Even otherwise, the evidence adduced by PSI Mr.Dayatar unerringly establishes that the provisions of Section 50 of the Act were complied with before effecting search of the field and seizure of cannabis plant therefrom. Mr.Dayatar has mentioned in his testimony that before effecting search of the field, which was in possession of the appellant, it was offered to the appellant that the field could be searched in presence of a magistrate or a gazetted officer if it was so desired by him, but the offer was declined by the appellant. The claim advanced by PSI Mr.Dayatar stands fully corroborated by the contents of document produced at Exh.79. As noticed earlier, Sub Divisional Police Officer Mr.Baranda, himself, who was a gazetted officer, was physically present at the time of search of the field of the appellant and seizure of cannabis plants. He has also referred to compliance of provisions of Section 50 of the Act by PSI Mr.Dayatar. The fact that necessary offer as contemplated by Section 50 of the Act

was made by PSI Mr.Dayatar and declined by the appellant, is mentioned in contemporary documents, namely, panchnama of search and seizure produced at Exh.13 and complaint lodged by Mr.Dayatar at Exh.67. Therefore, the plea that there is breach of provisions of Section 50 of the Act and, therefore, the impugned judgment should be set aside, cannot be accepted.

10. The last argument advanced by the learned counsel of the appellant is that the quantity of cannabis plant found from the possession of the appellant is less than commercial quantity prescribed under the Act as amended by Act No.9 of 2001 and, therefore, punishment imposed on the appellant should be suitably reduced. The learned Additional Public Prosecutor has maintained that having regard to the quantity of cannabis plant found from the possession of the appellant, sentence imposed cannot be said to be disproportionate or harsh and, therefore, the punishment imposed on the appellant should be maintained by this Court. On reconsideration of this question, this Court finds that the seizure of cannabis plant was effected on January 22, 2000, but the trial concluded when judgment was delivered by the learned Sessions Judge on January 11, 2002 and, therefore, the provisions of the Act as amended by Act 9 of 2001 would

be applicable to the facts of the case. Section 20(b)(ii)(B) of the Act, *inter alia,* provides that whoever in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder cultivates any cannabis plant and where such contravention involves quantity lesser than commercial quantity but greater than small quantity, he shall be punished with R.I. for a term which may extend to ten years and fine which may extend to one lakh rupees. In exercise of the powers conferred by Clauses (vii-a) and (xxiii-a) of Section 2 of the Act and in supersession of Ministry of Finance, Department of Revenue Notification S.O.527(E) dated July 16, 1996, the Central Government has issued Notification No. S.O.1055(E) dated October 19, 2001 specifying the quantity mentioned in Columns 5 and 6 of the Table appended thereto in relation to the narcotic drugs or psychotropic substances mentioned in the corresponding entry in Columns 2 to 4 of said Table as the small quantity and commercial quantity respectively. As per said notification, the commercial quantity of cannabis plant of genus *ganja* is 20 Kilograms. The quantity of cannabis plant having genus of *ganja* found in this case is 18 Kilograms and 350 Grams, i.e. less than commercial quantity. The scheme envisaged by the Narcotic Drugs & Psychotropic Substances

(Amendment) Act, 2001 (Act No.9 of 2001) is considered in detail by the Supreme Court in **Basheer Alias N.P.Basheer vs. State of Kerala, (2004) 3 SCC 609.** After considering the statement of objects and reasons of the Amendment Act No.9 of 2001 and the provisions thereof, the Supreme Court has noticed that as a consequence of the amending Act coming into force on October 2, 2001, the sentencing structure has undergone a drastic change. According to the Supreme Court, the Act has introduced the concept of 'commercial quantity' in relation to narcotic drugs or psychotropic substances by adding Clause (vii-a) in Section 2 of the Act. What is explained by the Supreme Court is that by the Amendment Act No.9 of 2001, punishment structure is rationalized and graded sentences linked to the quantity of narcotic drug or psychotropic substance are provided. What is held by the Supreme Court is that the Amendment Act No.9 of 2001 proposes to rationalize the sentence-structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. In view of the provisions of the Act, as amended by Act No.9 of 2001, this Court is of the opinion that the appellant cannot be branded as 'drug

trafficker' who was dealing in significant quantity of drugs. His case would fall in the category, which would attract less severe punishment. The prosecution has failed to produce any evidence on record indicating bad antecedents of the appellant. The reasons which were pleaded by the appellant before the trial Court for imposing lesser sentence, cannot be ignored by the Court. On the facts and in the circumstances of the case, this Court is of the opinion that interest of justice would be served if sentence of R.I. for ten years imposed on the appellant is reduced to sentence of R.I. for seven years while maintaining fine of Rs.1 Lakh and sentence of S.I. for one year imposed in default of payment of fine.

11. This Court finds that the appellant could not have been convicted under Section 29 of the Act. Section 29 of the Act provides punishment for abetment and criminal conspiracy. No evidence is adduced by the prosecution that the appellant had abetted commission of offence punishable under the Act or entered into criminal conspiracy to commit any offence punishable under the Act. Therefore, the conviction of the appellant under Section 29 of the Act cannot be sustained and is liable to be set aside.

For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant under Section 20(b)(ii)(B) of the Act recorded by the learned Sessions Judge, Junagadh, vide judgment dated January 11, 2002 rendered in Sessions Case No.56 of 2000 is hereby upheld. However, his conviction by the said judgment under Section 29 of the said Act is hereby set aside. The sentence imposed on the appellant for commission of offence punishable under Section 20(b)(ii)(B) of the Act is hereby modified and the appellant is sentenced to R.I. for seven years and fine of Rs.1 Lakh, in default S.I. for one year, for commission of offence punishable under Section 20(b)(ii)(B) of the N.D.P.S. Act, 1985. The appeal is partly allowed to the extent indicated hereinabove only. *Muddamal* to be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra